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No. 195.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

Office Supreme Court
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JAMES H. McKENNEY,
Clerk

OCTOBER TERM, 1900.

THE CALHOUN GOLD MINING COMPANY,
Plaintiff in Error.
vs.
THE AJAX GOLD MINING COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of Colorado.

BRIEF OF PLAINTIFF IN ERROR.

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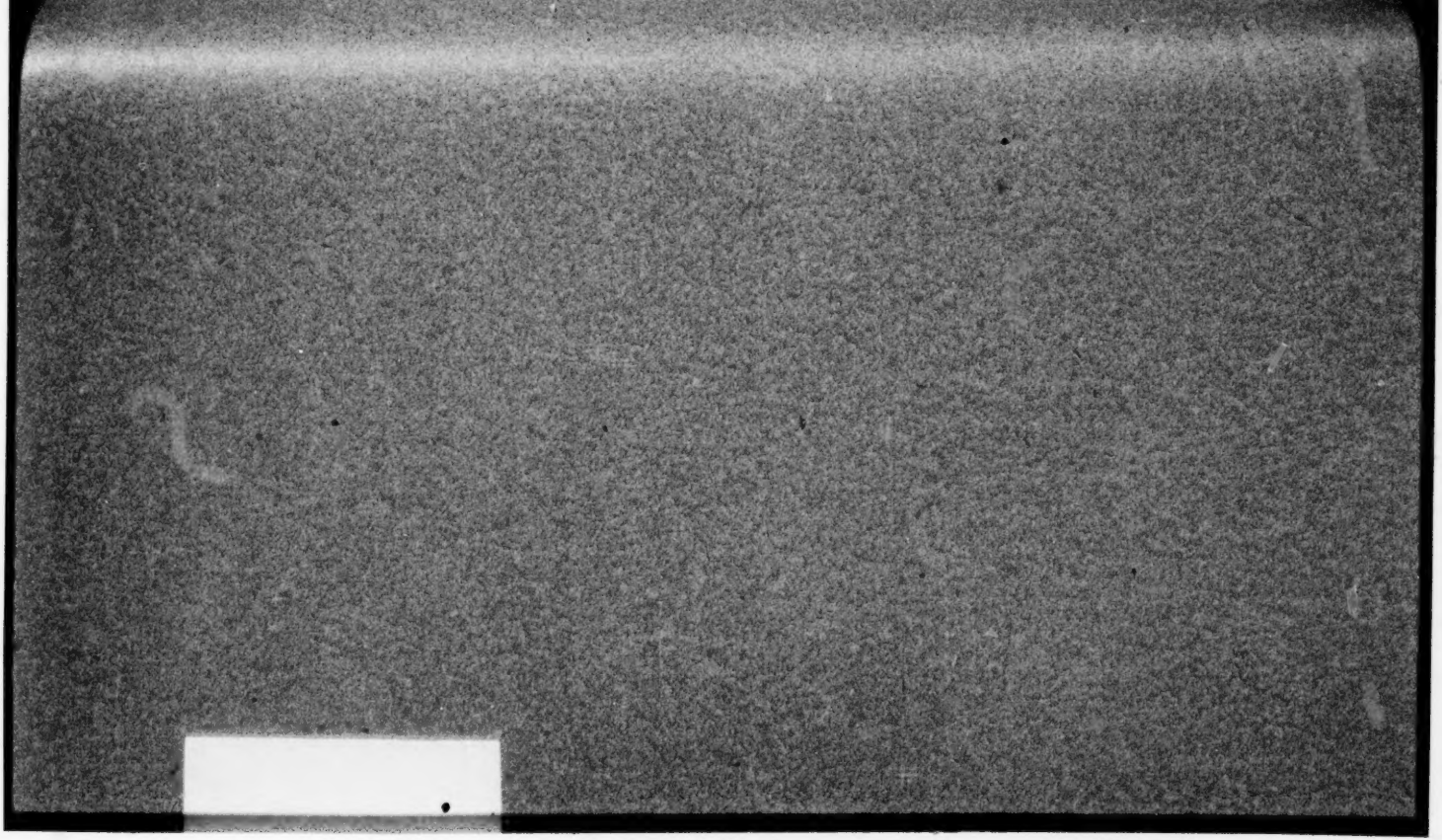

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BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

The plaintiff in error, The Calhoun Gold Mining Company, was appellant, and The Ajax Gold Mining Company, defendant in error, was appellee, in the Supreme Court of the State of Colorado.

Mr. Justice Gabbert, who delivered the opinion for

the Supreme Court of Colorado, makes a very clear statement of the facts material to the issues involved as follows, to-wit:

> "Appellee, owner of the Monarch, Mammoth Pearl, Apex and Champion Lode mining claims, commenced this action in the court below to recover damages and restrain appellant as defendant, from removing ore claimed to be within the boundaries of these claims and to which it asserted it was entitled by virtue of such ownership, and also to restrain defendant from prosecuting work upon a tunnel which the latter was excavating underneath such claims. Defendant answered justifying its removal of ore and excavation of the tunnel upon two grounds: (1) That it was the owner of the Victor Consolidated claim, the vein of which crossed each of those embraced within the claims of plaintiff, (2) that it was the owner of the Ithica tunnel site, projected across these claims, by virtue of which it was entitled to extend a tunnel underneath them; that in prosecuting work thereon it had penetrated the claims of plaintiff and discovered, located, and claimed numerous blind veins underneath the surface of such claims; that it had also cut the vein of its Victor Consolidated claim in its tunnel underneath the surface of plaintiff's claims and removed ore therefrom of the value of four hundred dollars and that it claimed to be entitled to excavate and run this tunnel for the purpose of discovering such blind veins,to work and remove ore therefrom and from its Victor Consolidated vein. By stipulation the Champion was dropped from the case. Upon the

issues made by the pleadings, the facts thereby admitted, a stipulation as to those controverted, and certain documentary evidence, the case was tried to the court, which resulted in a judgment adjudging plaintiff to be the owner in fee of each of its lode claims in controversy in their entirety as patented, and, *inter alia*, with respect to veins, 'together with all veins, lodes, or ledges having their tops or apexes therein, and including all that portion of the said Victor Consolidated vein within the side and end lines of the plaintiff's said claims, extended downwards vertically,' for damages in the sum of four hundred dollars, and also enjoining defendant from prosecuting work upon or extending its tunnel underneath the claims of plaintiff, and with respect to removing ore, enjoined defendant (employing the language of the judgment), 'from further taking out, extracting, or removing ore by means of said tunnel or otherwise from within the side and end lines of plaintiff's said claims, extended downward vertically.' "

From this judgment the defendant brings the cause here on appeal.

The following reproduction of the plat which the parties stipulated below was correct, showing the relative location of the respective properties over which this controversy arises, will materially aid in understanding the question involved.

(Here follows plat marked page 160.)

The controversy over the right of the appellant to extend its Ithica tunnel is from the point where it enters the Monarch on the southerly side and from thence across the claims of plaintiff. The blind leads discovered are in

that portion of the tunnel between the point where it enters plaintiff's claims on the south and the breast of its excavation. The vein of the Victor Consolidated is also cut in this tunnel at point marked 961. The conflict in the lode claims of the respective parties is included in the territory bounded by the south end line of the Apex, the north side line of the Mammoth Pearl, and the side lines of the Victor Consolidated between these two lines. We are relieved from stating the pleadings to any considerable extent or determining the questions of law thereby presented, because on the trial below it was stipulated that the following are involved:

First. Whether or not the Ithica tunnel, in such pleadings described, is entitled to a right of way through plaintiff's lode claims.

Second. Whether or not defendant has acquired by virtue of said tunnel-site location the ownership and right to the possession of the blind veins cut therein, to-wit, veins or lodes not appearing on the surface and not known to exist prior to the date of location of said tunnel site.

Third. Whether or not defendant is the owner and entitled to the ore contained in the vein of its Victor Consolidated claim, within the surface boundaries and across plaintiff's lode claims.

Fourth. Whether or not defendant may in this cause introduce evidence for the purpose of showing that there was no discovery of mineral in place on the Monarch and Mammoth Pearl claims of plaintiff prior to the location of said tunnel site.

From the pleadings, evidence, and stipulation of the parties, the facts established, so far as material to the controverted questions of law involved, are that each of appellee's claims was located prior to either the lode claim or tunnel site of appellant; that the receiver's receipt on

each of the claims of appellee issued prior to the location of the tunnel site and prior to the issuance of receiver's receipt on the Victor Consolidated; that the patents upon the lode claims of appellee issued prior to the patent on the lode claim of appellant; that the patent to the Apex issued prior to the location of the tunnel site and on the Mammoth Pearl and Monarch subsequent to such location; that the vein of the Victor Consolidated was discovered and located from the surface, was not known to exist prior to such discovery, extends throughout the entire length of that claim, and on its strike crosses each of the veins of the claims of appellee upon which they were respectively discovered and located; that the tunnel cuts numerous blind veins underneath the surface of the claims of appellee, which do not appear upon the surface and were not known to exist prior to the location of the tunnel; that the vein of the Victor Consolidated was cut in this tunnel underneath the claims of appellee and ore of the value of four hundred dollars removed therefrom. It also appears that the patents upon the lode claims of appellee embrace the conflict with the Victor Consolidated without any reservation as to either surface or veins, and in this respect conform to the receiver's receipts upon such claims; that the patent on the Victor Consolidated excludes the surface in conflict with the claims of appellee and all veins having their apex within such conflict, which are the same exceptions contained in the receiver's receipt for that claim; that the portal to the Ithica Tunnel site was at the date of its location on public domain; that work thereon was prosecuted diligently, and that the location of such tunnel was in all respects regular; that all necessary steps were taken by appellant to locate the blind veins cut in such tunnel, which are in controversy in this case; that the record titles of the claims of appellee are vested in it, and the record titles of the Victor Consolidated, the Ithica Tunnel site, the blind veins discovered

therein underneath the claims of appellee are vested in the appellant. The record discloses that appellant offered testimony tending to prove that at the date of the location of its tunnel site mineral in place had not been discovered on the Monarch and Mammoth Pearl Lode claims.

ASSIGNMENT OF ERRORS.

The errors assigned upon which the plaintiff in error relies are as follows:

First. The court erred in deciding that plaintiff in error is not entitled to the right of possession of the vein of its Victor Consolidated Lode mining claim through and across the Monarch, Mammoth Pearl and Apex Lode mining claims under section 2336 of the Revised Statutes of the United States.

Second. The court erred in denying to the plaintiff in error the right of way for its Ithica tunnel, located under section 2323 of the Revised Statutes of the United States, through and across the Monarch, Mammoth Pearl and Apex claims of defendant in error.

Third. The court errer in denying to the plaintiff in error, as the owner of the Ithica Tunnel site and mining claim, located under and by virtue of section 2323 of the Revised Statutes of the United States, the right of possession of all veins or lodes within three thousand (3,000) feet from the face of said tunnel on the line thereof, not previously known to exist, discovered in such tunnel, within the exterior boundaries of the said Monarch, Mammoth Pearl and Apex Lode mining claims.

Fourth. The court erred in denying to the plaintiff in error, as the owner of the Ithica Tunnel site and mining claim, located under section 2323 of the Revised Statutes of the United States, the right to prove that there was no discovery of any vein or lode within the

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limits of the claim located by appellee, to-wit: the Monarch and Mammoth Pearl claims, prior to the location and commencement of the said Ithica tunnel by the plaintiff in error and its grantors.

ARGUMENT.

The rights of the parties depend principally upon a construction of the following sections of the Revised Statutes of the United States:

> "§2322. The locators of all mining claims heretofore made or which shall hereafter be made, on any mineral vein, lode or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through

the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

"§2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnels shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

"§2336. Where two or more veins intersect and cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

The main questions presented for determination we summarize as follows:

1. Is the plaintiff in error the owner and entitled to the ore contained in the vein of the Victor Consolidated claim within the surface boundaries of the lode claims of defendant in error?

2. Has plaintiff in error acquired by virtue of its tunnel site location a right of way through the lode claims of defendant in error?

3. Has the plaintiff in error acquired by virtue of its tunnel site location, the ownership and right of possession to the blind veins cut therein underneath the claims of defendant in error.

4. Should plaintiff in error have been permitted to introduce evidence for the purpose of showing that there was no discovery of mineral in place on the Monarch and Mammoth Pearl claims previous to the location of the Ithica Tunnel site?

All these questions were answered in the negative by the Supreme Court of Colorado.

CROSS VEINS.

The first assignment of error brings before this Court for the first time the rights of a junior location of a cross vein within the side lines of a senior location under section 2336 of the Revised Statutes of the United States.

In the year 1879, the Hon. Moses Hallett, judge of the United States Circuit Court for the District of Colorado, in the case of Hall vs. Equator Mining company, held that:

> "After patent the patentee will be regarded as having the elder as well as the better

> title in all respects. This is true as to all things that are subject of the grant, but there still remains a question as to how much and what part of cross and intersecting veins are embraced in a patent."

"The general language of section 2322 seems to comprehend all lodes having their tops and apexes in the territory described in the patent, whether the same lie transversely or collateral to the principal lode on which the location was made.

Considered by itself, such would be the meaning and effect of that section. But there is another section relating to cross-lodes, which is of different import. It was numbered 14 in the original Act of 1872, Sec. 2336, R. S., 2nd Ed., and is as follows:"

> "Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

It will be observed that by this section the first locator and patentee of a lode gets only such part of cross and intersecting veins as lie within the space of intersection to the exclusion of the remainder of such lodes and veins lying within his own territory. So far this section is in conflict with section 2322, before mentioned, and the matter of precedence between them is settled by

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an arbitrary rule established long ago. As between conflicting statutes, the latest in date will prevail, so between conflicting sections of the same statute, the last in the order of arrangement will control. Bacon's Ab. Stat. D. Dwarris 156 N.: Brown vs. Co. Com'rs, 27 Pa. 37. Smith vs. Moore, 26 Ills. 392.

The presumption that one section of the statute was adopted before another, seems to be very slight, and perhaps this rule has no other merit than to afford the means of solving a difficult question. But the rule appears to be well established, and to be applicable to the present case. It gives to section 2336 R. S. or section 14, as it stood in the original Act, a controlling effect over the prior section, and limits the right of the first locator of a mine in and to cross and intersecting veins to the ore which may be found in the space of intersection. If there are in fact two lodes crossing each other in these locations, the plaintiffs having the elder title by patent, have the better right, but it is limited as last stated."

Hall vs. Equator Co., supra.

In the case of Branagan vs. Dulaney, 8 Colo., 408, decided in 1885, the court said:

> "The two sections quoted appear to have been carelessly draughted, for they are certainly to some extent in conflict with each other. If the latter section contained the only provisions bearing on the subject, we would have no hesitation in saying that where two veins cross each other, as alleged to be the fact in the present case, the senior location (Hidden Treasure) would only be entitled to the ore at the space of intersection of the veins; and that the owners

of the cross lode (Patrick Branagan) would be entitled to all ore found in their vein within the side lines of the senior location, save at the actual space of vein intersection. If this is not the rule intended to be laid down in section 2336, then it would seem that the framers of that section are liable to the charge of using words to *disguise* instead of *express* their meaning. This construction, however, seems to be in conflict with a literal interpretation of section 2322, which gives to the owners of the senior location all veins, lodes and ledges, throughout their entire depth, the tops or apexes of which lie inside the surface lines of the senior location. It is possible that it was not intended by the framers of this section to include *cross lodes* in the grant of the prior location. But if such was the intention, we see no way out of the dilemma, except by the application of the arbitrary rule of construction suggested by court in the case of *Hall vs. Equator, etc. supra,* that, as between conflicting statutes, the latest in date will prevail, and, as between conflicting sections of the same statute, the last in the order of arrangement will control; to which rule of construction the court cites Bac. Abr. St. 'D;' Dwar. St. 156, 'N;' *Brown vs. Com'rs,* 27 Pa. 37; *Smith vs. Moore,* 26 Ill. 392."

"These authorities, and those cited therein, support the proposition that in the above case not only the cross-vein would be reserved from the prior grant, but likewise a right of way for the purpose of excavating and taking away the mineral contained in the cross-vein. Also, that

upon a grant of the cross-vein itself, such right of way would pass as incident to the grant."

In the case of Lee vs. Stahl, 9 Colo., 208, decided in 1886, the court held that:

> "In the case of Branagan vs. Dulaney, 8 Colo., 408, it is held that under sections 2322, 2336, R. S. U. S., when a junior mining location crosses a senior location, and the veins therein are cross veins, the junior locator is entitled to all ore found on his vein within the side lines of the senior location, except at the space of the intersection of the two veins. In such a case a junior locator has a right of way for the purpose of excavating and taking away the mineral contained in the cross-vein. This decision rendered since the trial below, settles one of the principal points of contention involved in this case."

"Under the doctrine of Branagan vs. Dulaney, *supra*, and of the case of Hall vs. Equator Mining Co., therein cited, the effect of the provisions of section 2336 is to exclude a cross-lode, except at the point of lode intersection, as not a subject of grant. *Being excepted from the grant, it follows that the right to it is not lost by failure to adverse.*"

In the case of Margenson vs. Middlesex M. and M. Co., 11 Colo., 176, decided in 1887, the court said:

> "Since the trial of this case in the court below this Court has passed upon the main question presented by this appeal, holding that, when a junior mining location crosses a senior

> location, and the veins therein are cross-veins, the junior locator is entitled to all the ore found on his vein within the side lines of the senior location, except at the space of intersection of the two veins."

The case of Lee vs. Stahl, 13 Colo., 174, was before the court for the second time and the rule laid down in the cases cited above was followed.

In Coffee vs. Emigh, 15 Colo., 184, decided in 1890, held that the rule laid down in the foregoing cases had become an established law.

In Oscamp vs. Crystal River Co., 58 Fed., 293, the court said:

> "The plaintiff in this case is endeavoring to assert his superior right to the surface ground included within the small triangle. He is not seeking apparently to recover and to hold the defendant's lode or vein; and even if he should prevail in this action the defendant would still retain its cross-vein within the triangle, except at the point of intersection of the two veins together with such right of way for the purpose of taking out mineral as is now accorded to the owners of a cross-vein when it passes through an older location." Citing Branagan vs. Dulaney, and other cases, *supra*.

In Enterprise Mining Co. vs. Rico-Aspen M. Co., 66 Fed., 200, the court in referring to the foregoing case, to illustrate a principle, said:

> "The owners of the Vestal claim took their

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patent subject to the right of the owners of the tunnel to the possession of any unknown veins in that claim subsequently discovered in the tunnel, just as they took it subject to the right of the owner of an adjoining mining claim, who never made any adverse claim to their location, to follow on its dip through their patented territory any vein which has its apex in his claim, and just as they took it subject to the right of a junior locator of a cross-vein, who has made no adverse claim, to remove from the territory covered by their patent the ore in that vein not within the space of intersection." Citing the foregoing cases.

In harmony with the foregoing decisions, we find the decisions of the Secretary of the Interior, and the Commission of the General Land Office. Ever since the Act of May 10, 1872, the Land Department has issued patents upon lode mining claims crossing each other, and has expressly recognized the case of Branagan vs. Dulaney, *supra*.

Branagan vs. Dulaney, 2 L. D., 744.
Black Queen Lode vs Excelsior No. 1 Lode, 22 L. D., 343.
Aspen Cons. Mining Co., 22 L. D., 8.
Rebellion Mining Co., 1 L. D., 554.

The Department will not issue a patent upon two disconnected portions of a lode mining claim unless the same be bound together by a continuous vein owned by the applicant. If the vein be broken or a portion of it taken away by a prior placer patent, mill site or agricultural entry, the patent will not issue upon the discon-

nected portions of the lode claim. The lode claim is considered a legal entity.

Apple Blossom Placer vs. Cora Lee Lode, 21 L. D., 439.
Andromeda Lode, 13 L. D., 147; Bi-Metallic Mining Company, 15 L. D., 309.
Howards Case, 15 L. D., 504.

It will be observed in the statement of facts that all of the lode mining claims in controversy in the case at bar were located at a time when the foregoing decisions had settled the law of cross-veins in Colorado. The Victor Consolidated claim was located in October, 1893, and soon thereafter the plaintiff in error, The Calhoun Gold Mining Co. purchased and developed the same at an expense of $15,000, with full confidence in the correctness of the foregoing decisions. The law of cross-veins had been so long followed that it had become a rule of property, and all of the mining claims involved in this controversy were located and patented with full knowledge of the law upon the question. Our rights were acquired and developed under this rule of property, and to change the rule now is in effect an ~~ex post facto~~ retrospective law in so far as it applies to us.

This Court should give great weight to the foregoing cases since it has been concurred in for so long a time and followed by such eminent judges. Mr. Justice Hallett, for more than twenty years has followed this rule in all his decisions, and there is no more able or profound judge of mining law probably in the United States than this eminent jurist. Twelve different judges, illustrious for their learning in this branch, as Judges of the Supreme Court of Colorado, have followed these decisions without a dissenting opinion until the present personnel of that court came into office. The

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Circuit Court of Appeals of the United States, in two different cases cited above, have stamped this rule with their high approval. To reverse the rule now would take from us that which we had reason to believe was a vested right in the Victor Consolidated vein.

In Rockwell vs. Nelson, 24 Ind., 424, the court said:

> "We have had occasion in the last few months to overrule a number of cases, but only in the class which operate upon the future and not upon the past, and which, in our opinion, will be attended with unmixed good.
>
> "We cannot change a decision without producing confusion in titles, and the ruling would necessarily relate back to the time when the law came into force. As now constituted, however much we may differ from the opinion of our predecessors, we shall not introduce doubt and confusion into questions of property by overruling the previous decisions of this Court."

In Broom's Legal Maxims, 8th edition, page 147, the author says: "It is then an established rule to abide by former precedence, stare decisis, where the same points come again in litigation, as well to keep the scale of justice even and steady and not to waver with every new judge's opinion, as also because, the law and that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to altar or swerve from according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known law and customs of the land; delegated, not

to pronounce a new law, but to maintain and expound the old one—jus disere et non jus dare."

Depending upon the language cited in the case of Lee vs. Stahl, *supra,* for the past fifteen years,many locators of lode mining claims having prior and better titles have not adversed the applications for patents upon junior locations, *since the right to the vein in the conflicting territory was not lost by failure to adverse.* The surface was considered valueless, and only an incident to the vein. But now, under Judge Gabbert's decision, in the case at bar, not only has the prior locator lost the surface in conflict, but each and every vein having its apex therein. The far-reaching effect of this decision upon such cases will readily be seen when it is known that over ten thousand patents have been issued in the State of Colorado, and doubtless many of them were supposed to be governed by the rule laid down in Lee vs. Stahl.

And again, in Colorado lode claims are 300 feet in width, while the vein in most instances varies from a few inches to several feet in thickness. In many instances the owners of the cross-veins have mined, extracted and sold the ores therefrom within the side lines of the senior location. Should the rule be now changed, doubtless many damage suits would be instituted by the owners of the senior locations to recover for the ore so taken. Thus we may find that Judge Gabbert's decision in the case at bar, if affirmed by this Court, "has led to much confusion and has opened a fruitful source of litigation. Under it doubts have been cast upon titles to mining properties, and supposed rights reduced to uncertainties."

The first doubt ever cast upon the correctness of the foregoing rule by the Supreme Court of Colorado, is found in the case at bar. The court says:

"The first question presented involves par-

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ticularly, a construction of section 2336, *supra*. The rights of a junior location to the ore of its vein embraced in the conflict with a senior have been determined by this Court in Branagan vs. Dulaney, 8 Colo., 408, and in several subsequent cases which have adopted the doctrine announced in that case on this subject, and if we adhere to the law as announced in those cases, then the right of appellant to the ore in the vein of the Victor Consolidated, included in the territory of that claim conflicting with that of appellee, *are fixed and settled*, for under these decisions it would be entitled to all this part of its vein except where it intersects the vein of appellee's claims. It is contended by counsel for appellee that the ruling in Branagan vs. Dulaney and cases following it is wrong, and that this question should now be reconsidered. In opposition to reconsideration of the rights of cross-claimants, as declared by those cases, it is urged that the doctrine of stare decisis applies, and even if wrong, should not now be disturbed, because the rule therein announced has been established for such great length of time as to become a settled rule of property in this state. We are aware of the gravity of reversing a long-established precedent, and realize that it should not be disturbed except for the most cogent reasons; that the people of this commonwealth have a right to presume that when a question has been once settled by this Court, that its decision is correct and that all may rely upon it. We understand, generally, that when a decision has been established a settled rule of property upon which rights are predicated (and es-

> pecially those relating to real estate) the law will be adhered to by the court announcing it, and those bound to follow its adjudications, even if erroneous—Black on Interpretation of Laws, chapter 152—but this rule is not inflexible. Courts are not bound to perpetuate errors merely upon the ground that a previous erroneous decision has been rendered on a given question. If it is wrong, it should not be continued, unless it has so long been the rule of action and relied upon to such an extent that greater injustice and injury will result by a reversal, though wrong, than to observe and follow it."

Judge Gabbert recognizes the rule in Branagan vs. Dulaney as a "long-established precedent," but he proceeds to over-rule that case and cites Watervale M. Co. vs. Leach, 33 Pac., 418; Wilhelm vs. Sylvester, 101 Cala., 358; Pardee vs. Murray, 4th Mont., 234. We think his reasoning is illogical and does violence to the language of the Statute. He further says:

> "It is a matter of common knowledge that ever since the decision of this Court on that question its correctness has been doubted by many eminent members of the bar of this State familiar with mining law and has even been the subject of expression to that effect by this Court;" citing the Argonaut Co. vs. Turner, 23 Cala., 400.

We think the eminent jurist has misconstrued the latter decision. That case recognizes the rule in Branagan vs. Dulaney as settled and fixed. There is no attempt to disturb it. Courts should not be influenced by the

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private opinions of members of the bar. Those attorneys who have different opinions may not have investigated the question. If the decision of courts must be swayed by popular opinion there can be no stability to the law.

The court further says that the doctrine laid down in Branagan vs. Dulaney is not stare decisis, until the Supreme Court of the United States shall have passed upon the question. Technically speaking, this may be true; yet the rule has been followed so long that it has the same force and effect as a rule of property. Section 2336 has been correctly construed in Branagan vs. Dulaney; what is the meaning of "space of intersection?" An analysis of the first half of the section is necessary to a clear understanding. "Where two or more *'veins intersect'* or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the *'space of intersection.'* Here *'space of intersection'* relates back to *'veins intersect.'* *'Space of intersection'* then, must mean *'space of intersection'* of veins. No other construction is intelligible. The writers and courts atempting a different construction have found themselves in confusion, and they then pronounce the section ambiguous. All writers and courts agree that previous to the Act of May 10, 1872, each locator had but one vein; that where veins crossed each other the senior locator had the right to the ore in the "space of *intersection of the veins;*" that the junior locator had a right-of-way through the space of intersection; that rights which had attached previous to that date were in no manner disturbed; that these rights were preserved by section 2344. Now if section 2344 preserved these rights no other section was necessary for that purpose. But Judge Gabbert seems to think that section 2336 was also necessary and that when applied to veins located prior to May 10, 1872, intersection would clearly mean

the *"intersection of the veins,"* provided they crossed each other upon the strike. That when the Statute applied to parallel veins intersecting or crossing upon their dip located either before or after that Act, *"space of intersection"* would mean the *"intersection of veins."* Then the learned judge criticizes the Arizona case because it "fell into the error of holding that the *'space of intersection'* meant the intersection of the veins only." We agree, however, with Mr. Justice Gabbert when he states that the construction given by the Arizona court would "deprive a junior location made under the Act of 1872 of the right of way through the senior location if the former crossed the latter. "The California case is also subject to the same criticism. In that case the eminent jurist held that the section 2336 applied only to veins crossing on their dip, and thus would deprive the junior location of the right-of-way through veins crossing on their strike. Mr. Justice Gabbert says that the Montana case is not altogether clear, and here again we agree with him. In our opinion that case is susceptible of two constructions. It is not clear whether that court intended to follow the Colorado or the Arizona rule.

Mr. Justice Gabbert further says:

> "As we understand the rulings of the land department in issuing patent for conflicting mining claims there is always excepted from the surface of the junior that portion conflicting with the senior as well as all veins apexing within such conflict. This practice is in accord with our views, and although such a construction would not be controlling, the interpretation put upon that act by those whose duty it

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has been to construe, execute and apply it, is entitled to much weight."

The patent of the Victor Consolidated claim grants to The Calhoun Gold Mining Company "one thousand four hundred and ninety-six and nine-tenths feet in length along said Victor Consolidated vein or lode." Similar language is contained in the application for patent, the published notice, the application to purchase and receiver's receipt. The application for patent excludes *"area in conflict,"* but not the veins. The Register's published notice is "expressly excepting and excluding all conflict with surveys Nos. 7913 and 8178 *without waiver of lode claim rights."* The application to purchase, receiver's receipt and patent exclude the area and the veins.

In construing the clause *"excepting and excluding"* the court has fallen into an error which was not intended by the land department. *"Excepting and excluding"* does not mean abandonment or relinquishment. In Rebellion Mining Co., 1 L. D., 554, McFarland, commissioner said:

> "It is urged, however, that should this be done it would amount to an *abandonment* of all the ground in conflict. This is clearly a mistaken conclusion. *Such an exclusion is not a relinquishment."*

In Black Queen Lode vs. Excelsior No. 1 Lode, 22 L. D. 343, the Secretary of Interior said:

> "It is urged that this action (exclusion) by Hoover and Oscamp, is a waiver on their part of the ground in conflict. I do not so view it. If they had filed an abandonment of

the land, then it might be said that the entry by Black Queen would be permitted. But the showing here is only that they have excluded the territory from the entry. This they may do, and secure patent for the part thus entered, and hold the excluded ground under their possessory right." Citing Branagan vs. Dulaney, 2nd L. D., 744, decided by Secretary Teller.

In Aspen Mining Company, 22 L. D., 8, the clause "*especially excepting and excluding*" was again construed by the Secretary of the Interior, who held that it was not an abandonment nor a relinquishment. Various other decisions by the land department are to the same effect. These words are required by the land department in all patents where the surface conflicts with a senior patent; it is the act of the officers of that department, and not of the applicant, and the foregoing construction is uniform. Moreover, the law controls the patent; the patent is but the creature of the law.

Says Mr. Justice Field, delivering the opinion of the Court in Davies' Administrators vs. Weibold, 139 U. S., 507:

> "The officers of the Land Department, being merely agents of the government, have no authority to insert in a patent any other terms than those of conveyance with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion, they could limit or enlarge their effect without warrant of law. The patent to a mining claim carries with it such rights to the land which includes the claim, as the law confers, and no others,

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> and these rights can neither be enlarged nor diminished by any reservations of the Land Department, resting for their fitness only upon the judgment of those officers."
>
> Davies Admin. vs. Weibold, 139, U. S., 507, Id., page 527.

In concluding the discussion upon cross-veins the Colorado Supreme Court says:

> "Our conclusion is that the provisions of section 2336 apply to locations made under the Act of 1872, as well as before; refer to the intersection or crossing of veins either upon their strike or dip; that the space of intersection in determining the ownership of ore within such space means either intersection of veins or conflicting claims, according to the facts in each particular case."

Thus the court makes the language of the Statute extremely flexible, making it yield to at least two different constructions, "according to the facts in each particular case." The court then pronounces the Statute ambiguous, and we are not surprised. This canon of construction is new to us, and the learned justice has not favored us with a single citation suporting it.

We think the meaning of section 2336 is clear and unambiguous; that "space of intersection" means intersection of veins and not of claims; that it applies to veins located before, as well as after the Act of May 10, 1872; that it applies to veins which intersect or cross on their strike as well as on their dip; that in considering this section great weight should be given to the rules and customs of miners in various mining districts, and

the Acts of Congress in force before the Act of 1872; that if sections 2322 and 2336 are in conflict, the last in order of arrangement will control; that, as suggested by Branagan vs. Dulaney Congress may not have intended Section 2322 to include cross-veins; that the length of veins is measured only by the end lines, not by the side lines; that when a claim is located there can be but one set of end lines.

It has been urged by several courts and text writers that section 2336 does not in express terms give the cross-vein to the junior location. Under the laws as they existed previous to the Act of 1872, the junior location was entitled to all of the ore in the cross-vein, save at the space of intersection of the veins. Section 2336 grants to the prior location the ore at the space of intersection of the veins only; the grant is limited to the ore at the space of intersection of the veins; the right of way through this space of intersection of veins is given expressly to the junior claim; by this limitation of the right of way, to the space of intersection of the veins, the subsequent location was recognized as having a way of necessity to follow its vein, and as having the right to the ownership and possession of the ore therein contained within the side lines of the prior claim.

The difficulty with most courts and text writers in construing the mining statutes is that they are continually endeavoring to make new laws, or else they try to make the mining acts yield to common law principles. Mining laws of the United States are purely statutory. That eminent jurist, Mr. Justice Brewer said:

> "We find in some of the opinions assertions by the writers that they have devised rules which will work out equitable solutions of all difficulties. Perhaps those rules may have all the virtues which are claimed for them, and if so,

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it were well if Congress could be persuaded to enact them into statute; but be that as it may, the question in the courts is not what is equity, but what saith the statute?"

Del Monte M. & M.Co. vs. Last Chance M. Co., 171 U. S. 67.

RIGHT OF WAY FOR TUNNEL.

The second assignment of error, is as follows, to wit:

The Court erred in denying to the plaintiff in error, the right of way for its Ithica tunnel, located under Section 2323 of the revised statutes of the United States, through and across the Monarch, Mammoth Pearl and Ajax claims of defendant in error.

This assignment brings before this Court for the first time, the question, Does a tunnel located under said Section, have the right of way through and across a prior lode location?

Our contention is,

(1) That the tunnel has such right of way under said Section, by implication.

(2) By express legislation, Session Laws of Colorado, 1861, page 166, Mills Ann. Sts. Section 3141, "and persons working said tunnel shall have the right of way through all lodes which may lie in its course."

(1) According to the rules and customs of miners and the local laws in the various states and theritories, this right of way for a tunnel through a prior location has been exercised ever since mining was commenced in the United States. The tunnel may be three thousand (3,000) feet in length and the object of the law is to encourage development of the mineral resources. Development of those resources would be retarded if the tunnel locator were not permitted to drive through a prior lode location to

reach the undiscovered veins beyond. It would be a difficult matter to find a mining district so free from lode locations that a tunnel could be located to any advantage, without crossing them. If the tunnel be located across a prior lode location under the above Section, the owner thereof acquires the right to all blind veins in its course not previously known to exist, on each side of the prior location.

Tunnels are so located that the portal or face is usually near the foot of a mountain, and if the line of the tunnel happens to cross a lode claim, the undiscovered veins beyond the lode claim could not be reached by the tunnel, if there were no right of way. Thus, in most instances we should find that if the tunnel had no right of way, mining development would be retarded instead of encouraged; the intention of Congress would be thwarted.

(2) We recite here only that portion of the said Section of the Colorado Laws of 1861 pertaining to the right of way; that portion of the section relating to the length of veins was repealed by a subsequent law; Enterprise Mining Co. vs. Rico-Aspen Co., 66 Fed. 210. That portion of the Section, however, relating to right of way, has never been repealed either expressly or by implication. There is no subsequent law in Colorado contradictory to it, nor is it superceded by the said Section 2322 R. S. U. S. There is nothing in that Section which is repugnant to the law of Colorado, giving this right of way to tunnels; on the contrary, the Act of Congress expressly provides that the local rules and customs of miners in various mining districts, and the local laws of the various states and territories shall have full foce and effect where not repugnant to the laws of the United States. "Acts of Congress, when not repugnant, are supplemental to existing laws." Brodie Tunnel Co. vs. Brechtal 1 L. D. 588. This leaves in full force that portion of the statute of

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Colorado providing for such right of way. The repeal of a portion of one section of a statute does not necessarily repeal every part of the section. "The repeal extends only so far as inconsistency extends." Elrod vs. Gilliland 27 Georgia 467. People vs. Durick, 20 Cal. 94.

The said Section 2323 grants the undiscovered veins to the tunnel; grant of an estate is a grant of enjoyment. Section 2338, U. S. R. S. provides "as a condition of sale in the absence of necessary legislation by Congress, the local legislature of any state or territory may provide rules for working mines involving easements, privileges and other necessary means to their complete development, and these conditions should be fully expressed in the patent."

We think the right of way for the tunnel is clearly given when the local laws of Colorado are construed in connection with the Act of Congress as a whole. There are two or three cases in California pertaining to the right of way for tunnels, but in those cases the tunnel was not located under the Act of Congress, nor was there any similar state statute; hence these [illegible] are not applicable.

RIGHT OF POSSESSION OF VEINS INTERSECTED IN TUNNEL.

"The Court erred in denying to the plaintiff in error as the owner of the Ithica Tunnel site and mining claim, located under and by virtue of Section 2323 of the Revised Statutes of the United States, the right of possession of all veins or lodes within three thousand (3,000) feet from the face of said tunnel, on the line thereof, not previously known to exist, discovered in such tunnel within the exterior boundaries of said Monarch, Mammoth Pearl and Ajax Mining claims."

By an examination of the map it will be seen that

all of the veins intersected in the tunnel are cross-veins to the claims of defendant in error. In the agreed statement of the facts upon which the case was tried in the lower court, it will be observed that all the veins in controversy are blind veins; that they were never known to exist previous to the location of the tunnel. Now, if the rule as to cross-veins announced in Branagan vs. Dulaney be correct, and if we are correct in our second proposition, to wit: that the tunnel has a right of way, then we see no reason why we could not locate the cross-veins in the territory of defendant in error. We are familiar with the rule laid down by this Court in the case of Belk vs. Meager 104 U. S. 279; Gwillam vs. Donnellan 115 U. S. 45, and other similar cases, and we do not ask this court to overrule these cases. But we think the facts are different. Those cases were decided upon the theory that a trespasser could not make a discovery within a prior location. The land being appropriated. But if we have a right of way through our tunnel, and if the cross-vein intersected in the tunnel are excepted out of the patent of defendant in error, we are not trespassers, the veins were unappropriated.

In the Enterprise Mining Co. vs. Rico-Aspen Co., 66 Fed. 200, this precise question was not before the court, and yet the language of the Court is that the tunnel locator at the date of location of his tunnel, acquires an inchoate right to all blind veins not previously known to exist, crossing the line of the tunnel.

FOURTH ASSIGNMENT OF ERROR.

> "Should appellant have been permitted to introduce evidence for the purpose of showing that there was no discovery of mineral in place on the Monarch and Mammoth Pearl

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claims prior to the location of the Ithica Tunnel site?"

We are familliar with the case of Smelting Co. vs. Kemp. 104 U. S. 636, and other similar cases, and we have not overlooked the language of Mr. Justice Field, to wit: "We have so often had occasion to speak of the Land Department, the object of its creation and the powers it possesses in the alienation by patent of portions of the public lands, that is creates an unpleasant surprise to find that counsel in discussing the effect to be given to the action of that Department, overlook our decisions on this subject."

But the facts in the case at bar are different. The Monarch and Mammoth Pearl claims had been located, application for patent had been made, and receiver's receipt had been issued at the time of the location of the Ithica tunnel site. The patent was not issued until after the Ithica tunnel site was located, but at the time of the issuance of the patent there had been no discovery of any vein in the tunnel. A patent is a grant of the legal title, and had the patent issued prior to the location of the tunnel, we would not discuss this question. We are not attacking the validity of the patent; we simply desire to show that it relates back to the inception of right only. If there were no discovery of mineral in place when the receiver's receipt was issued, the entry would be void. Hallett & Hamburg lodes 27 L. D. 112. Receiver's receipt does not create a right; it only protects such rights as have already been created; patent relates back to inception of right only. McMurdie 8 C. L. O. 36, 194-9 C. L. O. 151. Land must be legally appropriated in order to sever it from public domain. Wilson vs. Jackson, 13 Peters 498. When patent issues, the fact that mineral was discovered before issuance of patent is settled; this is not the case with receiver's receipt; that instrument may be

cancelled by the Land Department at any time before the issuance of patent, by showing that there has been no discovery of mineral or rock in place within the limits of the location. Thus the question arises, to what date does the patent relate? The decisions of this Court are not in harmony upon this point. As far as we can determine from the various decisions, the patent relates back to the discovery of ore within the limits of the location, and if there were no discovery of ore within the limits of claims of defendant in error at the time of the location of the Ithica tunnel site, then the patent does not relate back to a time prior to the location of the tunnel. Our purpose in offering to show these facts was that our tunnel might be adjudged to be superior in point of time to the Monarch and Mammoth Pearl claims and thus make the patent subject to the rights of the tunnel and invoke the law as announced in Enterprise Mining Co. vs. Rico-Aspen Mining Co. 167 U. S. 108, and Ellet vs. Campbell 167 U. S. 116.

We submit that the decision of the Supreme Court of the State of Colorado should be reversed.

Respectfully Submitted,
W. E. SO RELLE,
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